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No. 93-1434

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In The

Supreme Court of the United States

October Term, 1993

THE ADVOCATES FOR LIFE, INC., an Oregon Nonprofit Corporation, *et al.*,

Petitioners,

vs.

LOVEJOY SPECIALTY HOSPITAL, INC., an Oregon Corporation,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Oregon

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the intentional torts of trespass and nuisance constitute speech protected by the First Amendment?

2. Whether the First Amendment precludes punitive damages for non-expressive, physical tortious conduct?

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STATEMENT OF THE CASE

The following facts are taken from the Oregon Court of Appeals' decision, and are necessary to fully understand the issues. *See* Appendix B to Petition. Petitioners include a nonprofit corporation and several individuals. Respondent is a private clinic that provides medical services. In 1986, petitioners began blocking respondent's doors and trespassing on the parking lot, private property surrounding the clinic building, and the clinic premises where respondent performed medical services for patients. Property damage, lost business, incidents of pushing, and other physical contact accompanied the protests.

Respondent brought an action for injunctive relief, trespass and nuisance, and sought compensatory, punitive and nominal damages. The court enjoined petitioners from entering respondent's property, demonstrating within a specified "keep clear" area, or blocking plaintiff's doors. Eighteen individuals violated the injunction. A trial on respondent's claims followed.

The trial court directed a verdict for respondent on the trespass and nuisance claims. The verdict was not challenged on appeal. The jury awarded nominal and punitive damages on each of the nuisance and trespass claims.

SUMMARY OF ARGUMENT

This is not a speech case; the complaint is one for trespass and nuisance. Punitive damages were assessed for tortious physical conduct; not for any viewpoint that petitioners held. The claims of trespass and nuisance on private property have no incidents of protected speech. It is beyond dispute that those who trespass on another's property and cause damage cannot avoid responsibility for the injury by claiming that the tort was motivated by a desire to speak, or that communication occurred during the trespass.

Even assuming that certain conduct was expressive, the jury was properly instructed regarding petitioners' First Amendment rights to oppose abortion and persuade others to oppose abortions, including the right to picket and demonstrate in a peaceful, non-violent manner.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING PETITIONERS' FIRST AMENDMENT RIGHTS.

The petition states that the trial court "erred in refusing to instruct the jury as to the constitutional protection of the right to speak . . .," and that consequently, the verdict was fueled by a desire on the part of the jury to discourage opposition to abortion in the community. Petition at page 6. This is a blatant misstatement of fact. The trial court instructed the jury as follows:

> The defendants have a constitutional right to oppose abortion and to try to convince others to oppose abortion and to persuade women not to have abortions. This also includes the right to picket and to demonstrate on public property in a peaceful, non-violent manner.

(Tr 17:23-24; Petition at B-6.) The jury was properly given an instruction that protected any lawful speech components of their conduct. No exception was taken to this instruction in the trial court or on appeal.

As noted by the Oregon Court of Appeals, petitioners in this case "did not properly request an instruction limiting the jury's

consideration of punitive damages to the non-expressive aspects of their conduct." *See* Petition at page B-7. Petitioners' requested instruction included a statement that "punitive damages may only be awarded against a defendant for conduct which is not intended to communicate." Petition at B-7. The Oregon Court of Appeals correctly held that this is an incorrect statement of law. *Id.*

II.

INTENTIONAL TORTS OF TRESPASS AND NUISANCE ON PRIVATE PROPERTY DO NOT CONSTITUTE SPEECH. COMMUNICATION WHICH MAY BE INCIDENTAL TO SUCH TORTS IS NOT PROTECTED BY THE FIRST AMENDMENT.

Respondent's claim for punitive damages was not based on the content of petitioners' speech or expressive conduct, but on harm caused by physical acts. The governmental interest in protecting a landowner from harmful and offensive physical intrusion and damage is unrelated to speech. The above-quoted jury instruction sufficiently precluded an improper basis for awarding punitive damages.

This Court has recently reaffirmed the principle that "[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Wisconsin v. Mitchell*, 508 U.S. __, __, 113 S. Ct. 2194, 2199, 124 L. Ed. 2d 436 (1993) (quoting with approval *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 3255, 82 L. Ed. 2d 462 (1984)). This Court distinguished a law that is "explicitly directed at expression" from one that is "aimed at conduct unprotected by the First Amendment." __ U.S. at __, 113 S. Ct. at 2201. Trespass clearly falls within the latter category. The First Amendment, therefore, is not implicated in this case.

The Oregon Court of Appeals decision in this case relied on *Huffman and Wright Logging Co. v. Wade,* 109 Or. App. 37, 817 P.2d 1334 (1991), *aff'd,* 317 Or. 445, 857 P.2d 101 (1993) which is consistent with the constitutional analysis of *Wisconsin, supra.* Under *Huffman,* a trespass claim can support punitive damages if the claim focuses on harm stemming from the physical trespass, and not on the content of the speech or expressive conduct that accompanied it.

This case is distinguishable from *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 1215 (1982), relied upon by petitioners. *Gertz* involved the tort of defamation which, by definition, constitutes speech or expression. The *expression* is exactly what is punished by the tort of defamation.

Trespass and nuisance, on the other hand, have no element of expression. Although they may be accompanied by expressive activity, these torts produce a special cognizable harm (an interference with respondent's possessory interest in its property), distinct from any communicative impact. *See Adderly v. Florida,* 385 U.S. 39, 47, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

Moreover, the First Amendment does not apply to private property that is not devoted to public use. There is no evidence that the property in this case has assumed the functional attributes of public property. Nor is there a need for evidence to conclude that petitioners had other means available to communicate their message. *See Central Hardware Co. v. NLRB,* 407 U.S. 539, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972).

CONCLUSION

Petitioners cannot insulate themselves from liability for their tortious behavior simply by asserting that it contains expressive elements. Although certain acts may have a communicative effect in the sense that most purposive human activity communicates something about the actor's state of mind, the acts in this case were conduct, not speech. To the extent they involve opinions or expressions, petitioners could have avoided liability by complying with the trial court's injunction and confirming their "speech" to the public spaces adjacent to respondent's medical clinic. They chose not to do so. The Oregon trial court correctly instructed the jury regarding petitioners' First Amendment right to demonstrate in a nonviolent manner. That instruction was not excepted to, nor is it at issue here. The facts of this case simply do not present the constitutional issue identified by the petitioners. Accordingly, the petition should be denied.

Respectfully submitted,

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